Supreme Court, U.S.
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NO. 95-1044

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Norfork And Western Railway Company
and Norfolk Southern Corporation

Petitioners

v.

Roosevelt Cerney

Respondant

RESPONDANT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondant, Roosevelt Cerney, was an employee of Petitioners, Norfolk and Western Railway and Norfolk and Southern Corporation (hereinafter jointly known as "Norfolk"). On or about August 9, 1988, while acting within the course and scope of his regular employment with Norfolk, Mr. Cerney was operating a track sweeper. Because of Norfolk's negligent maintenance of both the track sweeper and the railroad tracks it traveled on, the track sweeper Mr. Cerney was operating derailed and threw Mr. Cerney to the ground, causing him to sustain serious and debilitating injuries.

Mr. Cerney brought this action on August 8, 1990, pursuant to the Federal Employer's Liability Act (hereinafter "FELA"), 45 U.S.C. §51, to recover for the aforementioned personal injuries he sustained as the result of Norfolk's negligence. This lawsuit was assigned the Case Number 194859 in the Court of Common Pleas, Cuyahoga County, Ohio.

For approximately two years, the parties to this lawsuit actively negotiated to reach a settlement. On July 23, 1992, when it became clear that a settlement could not be reached prior to the set trial date of August 11, 1992, Cerney's counsel of record, Peter Weinberger, filed an uncontested Motion for Continuance. At a pretrial conference on August 4, 1992, Judge Bert Griffin denied the Motion for Continuance solely on the grounds that the Rules of Superintendence prohibited cases from remaining on the docket for more than two

years; however, Judge Griffin informed Mr. Cerney's counsel that the option to voluntarily dismiss the case without prejudice, while retaining the option to refile within one years time, under Ohio Civil Rule 41 (A), did exist. (See, Ruling and Opinion on Plaintiff's Motion for Relief from Judgment). Pursuant to the court's suggestion, Respondant Cerney, then filed a notice of voluntary dismissal on August 10, 1992.

Once again, the parties vigorously attempted to settle the case. When it again became clear that settlement could not be reached, Cerney refiled his complaint on August 6, 1993. The refiled complaint was assigned Cuyahoga County, Court of Common Pleas Case Number 256351. Norfolk then filed a motion to dismiss the refiled complaint, asserting that the refiled complaint was outside of the three year FELA statute of limitations as found in 45 U.S.C. §51.

Respondant Cerney, then filed a Motion for Declaratory Judgement seeking to have the voluntary dismissal void ab initio. The trial court denied Cerney's Motion for Declaratory Judgment and granted Norfolk's Motion to dismiss the refiled complaint with prejudice.

In order to vacate the voluntary dismissal of his original FELA complaint which was timely commenced, on February 25, 1994, Cerney filed a Motion for Relief from Judgment, pursuant to Ohio Civil Rule 60 (A) and (B). On July 1, 1994, the trial court ruled Ohio Civil Rule 60 (A) to be inapplicable, but granted the motion based on Ohio Civil

Rule 60 (B) (5). Id. at p.3. Thus, Cerney's voluntary dismissal of his original complaint which was timely filed was vacated.

All of the parties to the lawsuit appealed to the Eighth District Appellate Court. Respondant Cerney, appealed the granting of the Motion to Dismiss his refiled complaint, and Norfolk, appealed the granting of Cerney's Motion for Relief from Judgment.

The Eight District Appellate Court held that the granting of Norfolk's Motion to Dismiss the refiled complaint was proper because Cerney's refiled complaint was outside of the three year FELA statute of limitations and because Cerney could not offer any affirmative evidence that Norfolk equitably estopped themselves from asserting that the statute of limitations had run. The appellate court further held that the trial court did not abuse its discretion in granting Cerney's Motion for Relief from Judgment from his Voluntary Dismissal. The appellate court held that there was no intent on the part of Cerney to circumvent the statute of limitations. Furthermore, the appellate court noted that prior to the pretrial of August, 4, 1992, neither party anticipated filing a Notice of Voluntary Dismissal, and that it cannot be ignored that the initial suggestion to make said dismissal was made by the trial judge, for reasons that had to do with the court's docket rather than any issue in the case or because of the actions of the parties or their respective attorneys. The appellate court held that the trial court acted in

the interests of fairness and justice, and did not abuse its discretion in doing so. (Court of Appeals Judgment Entry, pp.10-12)

Petitioners Norfolk then sought further review of the Eighth District Appellate Court's Decision affirming the order of relief from judgment by filing a Notice of Appeal and A Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The Supreme Court of Ohio denied jurisdiction on October 4, 1995.

The Petitioners Norfolk now seek further review of the Cuyahoga County Court of Common Pleas granting of Cerney's Motion for Relief from Judgment by their Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

The Supreme Court of the United States should deny the Petitioners' request for a writ of certiorari for the reason that the relief from judgement granted by the trial court which vacated Respondant Cerney's voluntary dismissal of his original timely filed complaint was a valid procedure that does not directly challenge or contravene any Federal Legislation, The Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

When FELA cases are tried in state court, they are subject to state procedural rules and federal substantive rules. ***St Louis Railway Co. v. Dickerson***, 470 U.S.C. 409, 411 (1985). Accordingly, The trial court granted

Cerney relief from judgment from his voluntary dismissal of his original complaint (case no. 194859) pursuant to Ohio Rule of Civil Procedure 60 (B) (5) for reasons of judicial fairness and equity. When the court granted such relief, as it is entitled to so do under state and federal law, Cerney remained in court on his original complaint which was timely filed within the FELA statute of limitations. Thus, said relief from judgment does not involve the Ohio Savings statute and poses absolutely no threat to the uniformity of Federal Legislation, The Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

I. The trial court's order granting relief from judgment under Ohio Rule of Civil Procedure 60 (B) was proper because that action is authorized by Federal Law and that action is not, in any way, in contravention to Federal Law, The Supremacy Clause of The United States Constitution, or the Supreme Court Precedent found in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

The trial court properly granted Cerney relief from judgment from his voluntary dismissal of his original complaint. It is well established federal and state law that when a federal case is being tried in state court, the trial court is to apply state procedural rules and federal substantive rules. ***St Louis Southwestern Railway Co. v. Dickerson*** 470 U.S. 409, 411 (1985). See also, ***Norfolk***

& Western Railroad Co. v. Liepet, 444 U.S. 490, 493 (1980).

An order granting Relief from judgment is procedural. See Federal Rule of Civil Procedure 60 and Ohio Rule of Civil Procedure 60. **See also,** Petitioners' appendix which includes **state procedural** rule 60 from 49 states that also govern Relief from Judgment.) Since relief from judgement is procedural, a state trial court hearing a federal case may grant relief from judgment under a state's Civil Rule of Procedure 60 (B), as the trial court did in this case. As the trial court was authorized by federal law to grant Cerney relief from judgment, the trial court's use of Ohio Civil Rule of Procedure 60 (B) (5) to reinstate Cerney's original complaint that was timely filed was valid.

As a matter of fact, Petitioners' Norfolk have not argued that the trial court's use of Ohio Rule of Civil Procedure 60 (B) was improper procedurally. Petitioners simply argue that the use of rule 60 (B) will act as a substitute for the state savings clause and create a lack of uniformity in the FELA statute of limitations found in 45 U.S.C. §51; however, this assertion is purely fictitious for the following reasons: 1) The order granting relief from judgment under Ohio Civil Rule 60 (B)(5) did not produce a result inconsistant with that which could have been achieved under Federal Rule 60 (B)(6); and 2) the order granting relief from judgment does not extend the FELA statute of limitations.

II. The language and policy of Ohio Rule of Civil Procedure 60 (B) (5) are directly derived from Federal Rule of Procedure 60 (B) (6), thus an order granting relief from judgment pursuant to Ohio Rule of Civil Procedure 60 (B) (5) is consistant with the result that would be achieved under Federal Rule of Civil Procedure 60 (B) (6) and thus no lack of uniformity exists.

The language and policy of Ohio Rule of Civil Procedure 60 (B) (5) is derived from Federal Rule Of Civil Procedure 60 (B) (6). ***Celina Mutual Ins. Co. v. D'agostino*** (1971), 31 Ohio Misc 21. Both rules share similar language which allows a party to seek relief from judgment within a reasonable time for reasons not enumerated in (B) (1), (2), or (3). Both the Ohio and Federal Rules of Civil Procedure strictly limit the application of Rule 60 (B) (5) and Rule 60 (B) (6) respectively to circumstances that do not qualify under Rule 60 (B) (1), (2), or (3) or to situations that have extraordinary situations which would additionally qualify for relief under the Ohio Rule 60 (B) 5 or Federal Rule 60 (B) (6) provision. *Id.* See also, ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847 (1988). This is true so that a party may not circumvent the one year time limit applicable to Rule 60 (B) (1), (2), or (3) by simply requesting relief under the catch all provision.

In accordance with the restrictive policy of both the Ohio and Federal Rules, the trial court in the case at bar

granted relief from judgment under Ohio Rule 60 (B) (5). The trial court did not grant relief from judgment simply because Cerney did not file his motion for relief within the one year's time period mentioned in Rule 60 (B) (1), (2), or (3), but rather granted the motion under Ohio Rule 60 (B) (5) because of the extraordinary circumstance that it was the trial judge whom suggested that the plaintiffs dismiss their complaint so that the court could comply with the local rule of superintendence which required all court cases to be off of the docket before two years time. The trial court determined that this extraordinary circumstance qualified as a situation where relief from judgment under Ohio Rule 60 (B) (5) was appropriate. The appellate court affirmed that there were extraordinary circumstances that justified relief under Ohio Rule 60 (B) (5) and the Supreme Court of Ohio declined jurisdiction.

The trial court adhered to both the Ohio and Federal policies restricting the use of the catch all provision of 60 (B) and thus any decision rendered under Ohio Rule 60 (B) (5) will not create a result which could not occur under Federal Rule 60 (B) (6), thus uniformity exists and petitioners arguments fail.

Furthermore, contrary to petitioners' arguments, a state's granting of relief from judgment will not create a lack of uniformity in federal law. Petitioner's arguments that the state's relief from judgment provisions will have the same effect as the state savings statutes is clearly wrong. A

state order granting relief from judgment could never have the same effect as a State Savings Clause, as the petitioner argues, because they are two entirely different vehicles. A state savings clause strikes at the heart of the federal statute of limitations by guaranteeing the claimant the right to refile his complaint within a certain period of time. Thus, the state savings statute would automatically extend the FELA federal statute of limitations by whatever period of time the state savings statute called for. Hence there would not be any discernable federal statute of limitations. Automatically extending the FELA statute of limitations by various state rule with different time extensions is what *Burnett* sought to avoid. Thus, the *Burnett* court held that the State Savings Statute did not apply to FELA actions because of the great lack of uniformity it would create. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424

However, a state rule of procedure allowing relief from judgment does not guarantee a claimant anything. A relief from judgment is not a right guaranteed to claimants, it is a ruling which is handed down through judicial determination based upon the equities in a case. A state savings statute does not require a judicial determination to take effect whereas a relief from judgement does. A relief from judgment will only take effect when the equities in a case require. Thus a relief from judgement falls directly in line with the Supreme Court's rationale in *Burnett v. New York*

Central Railroad Co., in that it does not operate to extend the FELA statute of limitations. Thus an order granting relief from judgment under a state rule of procedure 60 (B) could never produce the lack of uniformity the Supreme Court of the United States sought to avoid in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

III. The trial court's order granting Cerney relief from judgment which vacated his voluntary dismissal of his original timely filed complaint will not create a lack of uniformity in the FELA statute of limitations, and as such, said order is not in violation of federal law, the Supremacy Clause of the United States Constitution, or Supreme Court Precedent.

The trial court's order granting Cerney relief from judgment reinstated his original complaint which was timely filed, and thus the order granting relief from judgment does not increase the FELA statute of limitations or create a lack of uniformity in the federal statute of limitations.

The order granting Cerney relief from judgment relieved Cerney of the voluntary dismissal of his original complaint.[1] Thus, the order granting

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[1] Cerney voluntarily dismissed his original complaint because of a recommendation by the trial judge based on factors involving the courts docket rather than any issue in the case or because of the actions of the parties or

relief from judgment reinstated Cerney's original complaint which was filed on August 8, 1990. The original complaint was timely filed within the three year FELA statute of limitations, as the date of the alleged negligence that formed the basis of said complaint occurred on August 9, 1988. Thus, the relief from judgment did not extend the time period Cerney had to file his complaint under FELA. Actually, Cerney filed his original complaint a full year before the FELA three year statute of limitations would have run. Thus, the relief from judgment did not extend the Statute of limitations applicable to FELA actions, does not create a lack of uniformity, and does not challenge either the Supremacy Clause of the United States Constitution or the Supreme Court Precedent of ***Burnett v. New York Central Railroad Co.***, 380 U.S. 424 (1965).

In the alternative, if this court finds that the order granting relief from judgment did extend the three year FELA statute of limitations, then the extension qualifies as an equitable extension of the FELA statute of limitations authorized by Supreme Court Precedent. ***Burnett v. New York Central Railroad Co.***, 380 U.S. 484, 426-427 (1985); ***Glus v. Brooklyn Eastern Terminal***, 359 U.S. 231 (1959); ***Osbourne v. United States***, 164 F.2d 767 (C.A.2d Cir. 1947); ***Scarborough v. Atlantic Coast Line Railroad Co.***, 178 F.2d 253

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their respective attorneys. See statement of Case.

(C.A.4th Cir 1949); *Frabutt v. New York*, 84 F. Supp 460 (D.C.W.D.Pa. 1949).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 484, 426-427 (1965), the court held that the FELA statute of limitations is not totally inflexible, and that it may be extended for certain equitable reasons as long as the congressional intent behind the statute of limitations is not circumvented.

The *Burnett* Court determined that the congressional intent behind the FELA statute of limitations is to ensure fairness to defendants by not allowing plaintiffs to "sleep on their rights" by not prosecuting their actions or by letting the actions slumber until evidence has been lost and memories have faded. *Id.* However, the court also stated that this intent is frequently outweighed where justice requires the vindication of plaintiff's rights. *Id.*

Several cases have held that when a plaintiff has not slept on his rights or slumbered, equitable bases for extending the FELA statute of limitations may be present. These equitable bases generally fall into two categories: 1) where the plaintiff diligently pursues his rights under FELA but misses the statute of limitations due to extenuating circumstances (See *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965); or 2) the conduct of the defendant results in plaintiff's failure to bring his action. (See *Glus v. Brooklyn East District Terminal*, 359 U.S. 231 (1959).

Several cases have found equitable

circumstances which do not frustrate the congressional intent of the statute of limitations to require extending the statute of limitations. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). See also, *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Osbourne v. United States*, 164 F.2d 767 (C.A.2d Cir. 1947); *Scarborough v. Atlantic Coast Line Railroad Co.*, 178 F.2d 253 (C.A.4th Cir 1949); *Frabutt v. New York*, 84 F. Supp 460 (D.C.W.D.Pa. 1949).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 432-434 (1965), the court held that where the plaintiff had timely brought his action in a state court having jurisdiction, and served process upon the defendants, yet his case gets dismissed due to improper venue, his subsequent filing in Federal Court which took place after the expiration of the statute of limitations will still be valid.

In *Burnett*, the plaintiff timely filed his FELA action in a state court which had jurisdiction over the matter involved. The plaintiff also obtained service of process over the defendants. However, the plaintiff's case was dismissed because Ohio Revised Code §2307.37 stated that a case for personal injury against a railroad may only be brought in the county where the plaintiff resides. The plaintiff did not reside in the county where he brought the suit and the suit was dismissed.

After the state filing was dismissed, Burnett filed an action in federal court pertaining to the same

injuries. Although the forum was correct the filing was beyond the three year statute of limitations and thus his federal filing was also dismissed. This court held that where the plaintiff has properly prosecuted his action in state court and his case is dismissed because of lack of venue, the statute of limitations may be extended or tolled, and thus his subsequent federal filing will be considered timely. The court expounded by saying that the plaintiff in that case did not sleep on his rights, but rather timely brought the action in state court of competent jurisdiction only to have it dismissed. Thus, the defendants could not rely on the statute of limitations since the congressional intent of the statute of limitations was met because the defendants were aware that the plaintiff was pursuing his rights.

The case at bar is remarkably similar to the ***Burnett*** case. In the case at bar, the relief from judgment granted by the trial court constitutes an equitable exception to the FELA statute of limitations.

Similar to the plaintiff in ***Burnett***, Cerney timely filed his action in a state court of competent jurisdiction. Furthermore, in the case at bar, Cerney had diligently prosecuted his claim, serving discovery on the Petitioners and achieving a settlement offer of One Hundred Thousand Dollars ($100,000.00). Also similar to the plaintiff in ***Burnett***, Cerney faced the possibility of being precluded from fully prosecuting his action because of an

inequity. In *Burnett*, the inequity was that the timely filed state action was dismissed due to improper venue; whereas in the case at bar the complaint was voluntarily dismissed according to the recommendation of the trial judge based on reasons concerning the courts docket rather than any action of the parties or their respective attorneys.

As the court in *Burnett* found there was a gross injustice and inequity which would operate to preclude the plaintiff from continuing to prosecute his timely filed state action, the trial court in this case also saw an injustice. The injustice that Respondant Cerney would not be able to fully prosecute his FELA action which was timely filed in state court because he followed the recommendations of the trial judge. The same equitable principles present in *Burnett* which caused the United States Supreme Court to allow a filing past the statute of limitations are present in the case at bar. Thus, the order granting relief from judgment by the trial court was in direct compliance with currently existing federal legislation allowing extensions to the flexible FELA three year statute of limitations. Hence, the order granting relief from judgment does not create any lack of uniformity which the Supreme Court of the United States has not previously authorized.

CONCLUSION

The trial court's order granting Cerney relief from judgment of his voluntary dismissal of his original complaint was a valid procedure which will not create a lack of uniformity in a federal FELA statute of limitations, thus the United Supreme Court should deny the Petitioners' request for a writ of certiorari.

Respectfully submitted,

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APPENDIX

STATE OF OHIO	)	IN THE COURT OF
	)SS:	COMMON PLEAS
CUYAHOGA COUNTY	)	CASE NO. 194859
ROOSEVELT CERNEY,	)	
	)	
Plaintiff	)	
	)	**RULING AND OPINION**
vs.	)	**ON PLAINTIFF'S**
	)	**MOTION FOR RELIEF**
NORFOLK AND WESTERN RAILWAY CO., et al.,	)	**FROM JUDGMENT**
	)	
Defendants	)	

Burt J. Griffin. J.:

Plaintiff moves, pursuant to Ohio Civil Rule 60 (B) (4) and (5), to vacate the judgment entry of voluntary dismissal dated August 27, 1992 resulting from plaintiff's own notice of voluntary dismissal dated August 10, 1992. The judgment of dismissal provided that the case was dismissed with "intent...to permit plaintiff to refile the matter within one year..." although the dismissal became effective with the filing of the notice of dismissal.

Plaintiff's cause of action allegedly arose on August 9, 1988. He filed his complaint for personal injuries on August 8, 1990.

The voluntary dismissal resulted because plaintiff had retained new counsel to try his case; new counsel desired time for additional discovery; and the court was unwilling to grant a further continuance beyond the two-year limit for concluding cases established by

the Rules of Superintendence. Such a continuance would have allowed plaintiff's case to retain priority on the Court's docket ahead of cases that had been more diligently prepared.

The parties, counsel, and the court believed that a voluntary dismissal by plaintiff would allow plaintiff to refile his case within a year and that his case would take its place on the Court's docket behind cases that had been filed earlier than plaintiff's refiling. No one at that time was aware that the Federal Employer's Liability Act precluded refiling because the statute of limitations had expired. On February 15, 1994, the Court granted defendant's motion to dismiss the refiled case, No. 256351, because of the United States Supreme Court's ruling on the right to refile FELA cases. See Court's opinion, *Roosevelt Cerney v. Norfolk & Western Railway Co., et al.*, Cuyahoga County Common Pleas Court Case No. 256351, unreported opinion (February 15, 1994). Plaintiff, thereafter, on February 25, 1994, filed this motion to vacate the judgment of dismissal in Case No. 194854.

If any relief is available to plaintiff it must be under Civil Rule 60 (B) (4) or (5). Rule 60 (A) Clerical Mistake does not apply since the error in this case was an error of judgment by plaintiff's counsel. See *Dentsply International Inc. v. Kostats*, 26 Ohio App.3d 116 (Cuyahoga County, 1985); Wright & Miller, Federal Practice and Procedure, §2854, p. 149 (1977). The motion cannot be considered under Rule 60 (B) (1), (2) and (3) because it was not filed within the one-year time limit

applicable to those subsections.

Whether this motion should be deemed to be governed only by Rule 60 (B) (1), (2), (3) and thus be precluded or is cognizable under Rule 60 (B) (5) depends on how one views the central facts giving rise to the dismissal. There can be no doubt that a central reason for plaintiff's voluntary dismissal was a mistake in judgment by plaintiff's counsel and inadequate preparation by plaintiff's original counsel.

Plaintiff's original counsel was not prepared to try the case on the date set for trial and secured new counsel for the plaintiff. New counsel believed not only that he needed more time for preparation but also that additional discovery was necessary. When the court would not permit a continuance of trial, counsel for the plaintiff dismissed the case in the mistaken belief that the Ohio Savings Statute would permit refiling within a year. The denial of the continuance was based upon the Court's insistence that the time deadlines of the Rules of Superintendence be observed.

Although inadequate preparation by original counsel was the underlying cause of the need to dismiss, the remaining decisions reflected a desire by plaintiff's counsel to be diligent. None of the plaintiff's loss of his right to a trial stems from a judgment about the merits of his case. Rather, issues of court management and lawyer performance have caused him to suffer.

It is not the purpose of the Rules of Superintendence to deny party a hearing on the merits of his case. Only the most extreme or repeated lawyer

misconduct should ordinarily justify a dismissal for procedural reasons that prevents a refiling and hearing on the merits. There is no question that plaintiff's voluntary dismissal was an act of procedure that was intended ultimately to secure a hearing on the merits, if necessary.

Accordingly,[1] since the only purpose of the court in denying a motion for continuance of the trial and bringing pressure on plaintiff's counsel to dismiss was to deny plaintiff priority on the Court's calendar, plaintiff has demonstrated a reason under Civil Rule 60 (B) (5) to vacate the dismissal. The motion to vacate is granted on the condition that plaintiff pay to defendants all expenses of this litigation reasonably incurred by them since August 10, 1992 that relate to all of plaintiff's claim or the vacating of this dismissal order.

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1. The court is satisfied that plaintiff's claim has sufficient merit to proceed to trial since defendant never successfully filed a motion for summary judgment.

Pretrial conference is set for 10/03/94 at 2:30 p.m. Trial is set for 11/14/94 at 9:00 a.m. All discovery shall be completed prior to the pretrial conference.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

Date: July 1, 1994

CERTIFICATE OF SERVICE

A copy of the foregoing Ruling and Opinion has been forwarded by Regular U.S. Mail this 1st day of July, 1994, to:

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/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

OHIO RULE OF CIVIL PROCEDURE 60

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(A) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other

reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or take. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. Relief from Judgment or Order
(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have ben discovered in time to move for a new trial under Rule 59 (B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief

from the operation of a judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.